National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

October 17, 1990

Rosemary Pye, Regional Director, Region 1; Harold J. Datz, Associate General Counsel, Division of Advice

Locals 26 and 475 Brotherhood of Carpenters and Joiners (Caldor, Inc.), Cases 1-CC-2341; 1-CE-74

560-2575-6713, 560-7520-7500, 584-1250, 584-3740-1700, 584-5028

This case was submitted for advice as to whether the Unions violated Section 8(b)(4)(ii)(A) by filing grievances to enforce a subcontracting clause that is allegedly violative of Section 8(e).

FACTS

The Employer operates a chain of retail stores and employs thousands of employees. On October 26, 1983, the Employer entered into a short-form contract with 20 local Carpenters unions, including those involved in this case ("the Unions"). This contract provides that the Employer accepts, as its own, the current collective-bargaining agreement between the Unions and various multi-employer associations. The short-form contract also contains an "evergreen" clause, which provides as follows:

The life of this Agreement shall be co-extensive with the terms set out or as they shall be set out from time to time in the collective bargaining agreement between the Employers and the Unions and shall continue in effect unless either party gives notice of termination of a particular collective bargaining Agreement in accordance with the applicable notice provisions contained therein. In the event that neither party hereto gives timely notice of termination with respect to a collective bargaining agreement, then such agreement shall remain in effect until a successor agreement is entered into . . . .

Notice of termination has never been given by either the Employer or the Unions. Therefore, the Employer is bound to the current collective-bargaining agreement between the Unions and the multi-employer associations. This agreement is effective by its terms from June 1, 1989 through May 31, 1993, and contains the following language regarding subcontracting:

... except for filed sub-bids, the Employer agrees that neither he nor any of his subcontractors on the job site will subcontract any work to be done at the site of construction ... except to a person, firm or corporation, party to a current labor agreement with the Union signatory to this agreement or which becomes signatory to a current labor agreement with approval of the Business Agent.

It is not disputed that the Employer was engaged in the construction industry when it signed the short-form contract in 1983. Thus, at that time, the Employer acted as its own general contractor for its new store construction and store remodeling projects. See Los Angeles Building & Construction Trades Council (Church's Fried Chicken), 183 NLRB 1037 (1970). However, the evidence indicates that the last job for which it acted as its own general contractor and used a Union hiring hall was completed in early 1987. Since then, the Employer has always hired general contractors, and has not used Union hiring halls to obtain construction employees.

On October 30, 1989, the Employer was acquired by new owners, and now leases all of its facilities. New stores are constructed by developers, and the Employer has no control over the selection of general contractors or subcontractors. The Employer periodically sends representatives to such construction sites to ensure that the building specifications are being followed.

When the Employer remodels existing stores, it develops plans that include specifications and time tables. These plans are then used in advertising for bids. After reviewing the bids, the Employer selects a general contractor, but the Employer does not select, and has no control over, any subcontractors which subsequently may work on the project. During such remodeling projects, the Employer purchases the fixtures to be used, and meets weekly with the general contractor solely to review the

progress of the work.

In early 1990, the Employer selected a general contractor on two bids for remodeling jobs. The jobs were in the jurisdictions of the Unions. The general contractor was non-Union. By letter dated May 11, the Unions' attorney informed the Employer that it is signatory to a collective-bargaining agreement that required the Employer to contract out all work to contractors who are signatory to an agreement with the Carpenters. On June 12, the Unions made two demands for arbitration regarding alleged violations of the subcontracting provision of their current agreement with the multi-employer associations.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Unions violated Sections 8(e) and 8(b)(4)(ii)(A) by filing and pursuing to arbitration their subcontracting grievances.

In Carpenters Local 743 (Longs Drug), 278 NLRB 440 (1986), the Board found that the union violated Section 8(e) by filing a grievance over the employer's failure to comply with a contractual subcontracting clause essentially similar to the clause herein. Since the subcontracting clause was secondary, it was unlawful unless protected by the construction industry provisio to Section 8(e). During the term of that contract, the employer engaged a non-union general contractor to build a new store. For a few weeks, the employer itself employed some carpenters to install fixtures in the store. The Board, in finding the 8(e) violation, held that the employer was not in the construction industry because the actual construction work it performed was of limited scope, and the employer did not act as its own general contractor on the construction project.

In the instant case, the Employer has not been engaged in the construction industry since 1987. Thus, it has neither acted as its own general contractor nor exercised control over general contractors that have been awarded bids, other than periodically checking the progress and quality of the contractor's work. See Longs Drug, supra, 278 NLRB at 442. Further, the Employer has not even engaged in the limited direct hiring of construction employees that was present in Longs Drug. Therefore, the Employer was not engaged in the construction industry at the time when it became bound to the current contract between the multiemployer associations and the Unions. The fact that the Employer was engaged in the construction industry when it became bound to earlier contracts between the associations and the Unions is irrelevant. Accordingly, the Employer's agreement the current contract between the associations and the Unions is unlawful under Section 8(e). By filing and pursuing to arbitration the 1990 subcontracting grievances, the Unions reaffirmed that provision and violated Section 8(e). See Longs Drug, supra, at 443, and cases cited there.

We further conclude that this conduct by the Unions violated Section 8(b)(4)(ii)(A). As noted above, the grievances seek a result which is unlawful under Section 8(e). Since the clause, as construed by the Unions, would violate Section 8(e), the pursuit of the grievances herein is coercive and violative of Section 8(b)(4)(ii)(A). Elevator Constructors (Long Elevator and Machine Co. Inc.), 289 NLRB No. 132, slip op. at 3 (1988).

Accordingly, an appropriate complaint should issue, absent settlement.

H.J.D.